Windus v Krassniqui
2019 NY Slip Op 34469(U)
February 25, 2019
Supreme Court, Rockland County
Docket Number: Index No. 034971/2017
Judge: Sherri L. Eisenpress

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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RICHARD WINDUS,

Plaintiff,

-against-

BEHAR KRASSNIQUI AND BUJAR KRASNIQI,

Defendant.

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DECISION & ORDER

Index No.: 034971/2017

(Motion # 1)

Sherri L. Eisenpress, A.J.S.C.

The following papers, numbered 1 through 5, were considered in connection with Plaintiff's Notice of Motion for an Order, pursuant to *Civil Practice Law and Rules* § 3212, granting partial summary judgment in favor of Plaintiff on the issue of liability, and for such other and further relief as this Court deems just and proper:

PAPERS	**NUMBERED**
NOTICE OF MOTION/AFFIRMATION IN SUPPORT/AFFIDAVIT OF WINDUS RICHARDS/EXHIBITS "A-I"	1-3
AFFIRMATION IN OPPOSITION	4
AFFIRMATION IN REPLY/EXHIBITS "A-E"	5

Upon a careful and detailed review of the foregoing papers, the Court now rules as follows:

This action was commenced by Plaintiff on October 11, 2017, with the filing of the Summons and Complaint through the NYSCEF system. Issue was joined with the filing of Defendant's Answer through the NYSCEF system on January 12, 2018. The action arises from an accident which occurred on December 30, 2015, on Route I-87 southbound, near mile marker 16.2, in the Village of Grandview on the Hudson, County of Rockland. Plaintiff alleges that a vehicle owned and operated by defendants struck the rear of his vehicle, causing him to lose control and strike the guardrail.

The proponent of a summary judgment motion must establish his or her claim or defense sufficient to warrant a court directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the lack of material issues of fact. *Giuffrida v. Citibank Corp., et al.*, 100 N.Y.2d 72, 760 N.Y.S.2d 397 (2003), citing *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986). The failure to do so requires a denial of the motion without regard to the sufficiency of the opposing papers. *Lacagnino v. Gonzalez*, 306 A.D.2d 250, 760 N.Y.S.2d 533 (2d Dept. 2003). However, once such a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form demonstrating material questions of fact requiring trial. *Gonzalez v. 98 Mag Leasing Corp.*, 95 N.Y.2d 124, 711 N.Y.S.2d 131 (2000), citing *Alvarez*, *supra*, and *Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 508 N.Y.S.2d 923 (1985). Mere conclusions or unsubstantiated allegations unsupported by competent evidence are insufficient to raise a triable issue. *Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980), 427 N.Y.S.2d 595.

According to Plaintiff's examination before trial testimony and his affidavit submitted in support of the motion, the accident occurred when Plaintiff was driving in the center lane of the highway. He felt a "jolt" when the rear of his vehicle was struck. The heavy impact caused his vehicle to spin out of control, entering the right lane of travel, and then striking the concrete barrier on the right side. Plaintiff submits the police report and photographs of his vehicle which show damages to the right side rim and tire. Defendant testified that he was traveling in the right lane and plaintiff was traveling in the middle lane. Soon after Plaintiff's vehicle passed Defendant's vehicle, he observed plaintiff lose control of his vehicle, enter defendant's lane of travel, pass through the lane, and ultimately crash into the adjacent guardrail. Defendant testified that once Plaintiff's vehicle hit that barrier, he was caused to strike the right back side rim of Plaintiff's vehicle.

It is well-settled that a rear-end collision with a stopped or stopping vehicle

creates a prima facie case of liability with respect to the operator of the moving vehicle, unless the operator of the moving vehicle can come forward with an adequate, non-negligent explanation for the accident. *See Smith v. Seskin,* 49 A.D.3d 628, 854 N.Y.S.2d 420 (2d Dept. 2008); *Harris v. Ryder*, 292 A.D.2d 499, 739 N.Y.S.2d 195 (2d Dept. 2002)]. Further, when the driver of an automobile approaches another from the rear, he or she is bound to maintain a reasonably safe rate of speed and control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle. *VTL* § 1129(a) ("The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon the condition of the highway."); *Taing v. Drewery*, 100 A.D.3d 740, 954 N.Y.S.2d 175 (2d Dept. 2012). Drivers must maintain safe distances between their cars and cars in front of them and this rule imposes on them a duty to be aware of traffic conditions, including vehicle stoppages. *Johnson v. Phillips*, 261 A.D.2d 269, 271, 690 N.Y.S.2d 545 (1st Dept. 1999).

Plaintiff asserts that there are no triable issues of fact because Defendant's claim of how the accident occurred is not supported by the police investigation report which states that "investigation revealed that V-2[1] drove into the rear of V-1 striking the left rear tire. Indication showed from underneath of the left side of the cab of V-1 and the driver side hood of V-2." It is well settled that a police report is admissible to the extent that it contains facts observed by the officer who prepared it, but it is generally not admissible to the extent that it contains opinions or conclusions drawn from the facts. *Murray v. Donlan*, 77 A.D.2d 337, 347, 433 N.Y.S.2d 184 (2d Dept. 1980); *Szymanski v. Robinson*, 234 A.D.2d 992, 992, 651 N.Y.S.2d 826 (4th Dept. 1996). Although the conclusions might be admissible if based on "post incident expert analysis of observable physical evidence", in the absence of evidence that the police officer was qualified to conduct post-incident expert analysis, the police officer's report containing

[1]In the police accident report, V-1 refers to plaintiff's vehicle and V-2 refers to defendant's vehicle.

unqualified opinion evidence of the officer is inadmissible. *Casey v. Tierno*, 127 A.D.2d 727, 728, 512 N.Y.S.2d 123 (2d Dept. 1987).

In the instant matter, while it appears that the conclusion drawn in the police report was based on observable physical evidence of the right rear tire of Plaintiff's vehicle, Plaintiff made no showing that the author of the police report was qualified to conduct post-incident expert analysis. Thus, while the conclusions set forth in the accident report may ultimately be admissible at trial, provided the proper foundation is laid regarding the qualifications of the officer, that portion of the accident report is not in admissible form with respect to the summary judgment motion before this Court. While pictures of the damage to the vehicle have also been submitted, no expert opinion has been submitted in support of Plaintiff's contention that the damage could only have been sustained if the accident occurred in the manner Plaintiff testified to. Accordingly, what this Court has before it is two conflicting versions of the accident with respect to whether Plaintiff was caused to lose control of his vehicle as the result of a rear end collision or he lost control of his vehicle and was then struck by defendant. "On a motion for summary judgment, the function of the court is not to determine issues of fact or credibility, but merely to determine the existence of such issues." *Dykeman v. Heht*, 52 A.D.3d 767, 769, 52 A.D.3d 767 (2d Dept. 2008). As such, Plaintiff's summary judgment motion must be denied.

Accordingly, it is hereby

ORDERED that Plaintiff's Notice of Motion for Summary Judgment on the issue of liability is DENIED; and it is further

ORDERED that counsel for the parties shall appear in the Trial Readiness Part on **WEDNESDAY, MARCH 27, 2019, at 9:45 a.m.**

The foregoing constitutes the Decision and Order of this Court on Motion # 1.

Dated: New City, New York
February 25, 2019

HON. SHERRI L. EISENPRESS
Acting Justice of the Supreme Court

To: All Parties
(Via NYSCEF)